

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE**

IN RE

JAMES MAULKMUS McMILLAN
f/d/b/a J. McMILLAN & COMPANY and
CAROL ANN McMILLAN
Debtors.

Case No.: 09-30986
Chapter 7

BUFFALO CONSTRUCTION, INC.
Plaintiff,

VS.

JAMES MAULKMUS McMILLAN
f/d/b/a J. McMILLAN & COMPANY and
CAROL ANN McMILLAN
Defendants.

Adv. Proc. No. 09-3073

BRIEF IN SUPPORT OF MOTION TO DISMISS

Come now the Defendants, by counsel, and for their Motion to Dismiss this case would show unto the court as follows:

I. FACTS

1. The facts are incorporated herein from the Motion to Dismiss filed with this Brief.
2. The Court's docket reflects the dates of the events cited in the Motion to Dismiss with respect to the filing of the Amended Complaint and issuing of the Summons as well as service of the original Summons and Alias Summons.

II. ARGUMENT

Pursuant to Bankruptcy Rule 7004(m) as incorporated the Federal Rules of Civil Procedure states as follows:

(m) **Time Limit for Service.** If a defendant is not served within 120 days after the complaint is filed, the court—on motion or on its own after notice to the plaintiff—must dismiss the action without prejudice against that

defendant or order that service be made within a specified time. But if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate. This subdivision (m) does not apply to service in a foreign country under Rule 4(f) or 4(j)(1).

The Plaintiffs have failed to properly serve the Amended Complaint as stated in the above facts as required by Rule 7004(m) within 120 days following the filing of the original Complaint. Failure of service entitles the Defendants to a dismissal of the Complaint upon the Defendant's Motion where the Plaintiff has failed to meet the service requirements and did not ask for any extension of any such deadline.

In this case the Plaintiff has no basis or "cause" whatsoever in which to request an extension of time after the expiration of the 120 day period. See *Espinoza v United States*, 52 F 3d, 841 (10th Cir 1995) for a good discussion of the Rule's requirements limiting exceptions to the 120 day service requirement.

III. CONCLUSION

The Defendants are entitled to an Order dismissing the Complaint entirely for failure to serve the Complaint as required by the Rules of Civil Procedure, Bankruptcy Rule 7004(m) and for such other and further relief to which they may be entitled.

Dated this 3rd day of December, 2009.

/s/ John P. Newton, 010817
/s/ Richard M. Mayer, #5534
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing **Brief in Support of Motion to Dismiss** has been served either electronically (ECF) or by placing in the United States First Class Mail (USM) with sufficient postage to insure delivery:

D. Scott Hurley
Attorney for Plaintiff
P. O. Box 682
Knoxville, TN 37901

Dated: December 3rd, 2009.

/s/ Richard M. Mayer, #5534
/s/ John P. Newton, Jr., 010817
Law Office of MAYER & NEWTON
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